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Supreme Court of the United States

OCTOBER TERM 1929

NO. 363

GEORGIA POWER COMPANY
Petitioner

vs.

CITY OF DECATUR
Respondent

PETITION FOR CERTIORARI
AND
BRIEF IN SUPPORT THEREOF

Supreme Court of the United States

OCTOBER TERM 1929

No.....

GEORGIA POWER COMPANY, PETITIONER

vs.

CITY OF DECATUR, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

May it please the Court:

The petition of the Georgia Power Company respectfully shows this Honorable Court:

1.

The City of Decatur (a municipal corporation of the State of Georgia) brought an equitable petition against the Georgia Railway & Power Company and the Georgia Railway & Electris Company (subsequently consolidated into the Georgia Power Company) to enjoin the street railway companies from ceasing to operate its lines (known as the North Decatur line) within the limits of the Town of Decatur and to perpetually compel operation thereof at a five cents rate of fare per passenger; claiming that:

(a) The Town of Decatur (now the City of Decatur) granted a franchise to the Collins Park & Belt Railroad Company on the 4th day of September 1899 (set out in full on

pages 6-8 original record and pages.....of printed record) and the line in question was constructed and operated thereunder within the said municipality. Said line and franchise was conveyed to the Georgia Railway & Electric Company; and on April 1, 1903 said Company and the City of Decatur amended the said franchise grant and entered into a contract which bound the street railway company to perpetually operate the said line in Decatur and "never charge more than 5 cents for one fare for one passenger thereon." (Said contract set out in full on pages 14-22 of original record and pages..... of the printed record.)

(b) That the street railway companies by corporate action sought to end, terminate and surrender its franchise in Decatur and the right to operate thereunder; and did on the 25th day of September 1925 notify the City of Decatur in writing of the surrender of its permits, franchises and contracts with the Town of Decatur under and by virtue of which its North Decatur line was constructed and operated therein; and that they would discontinue operation on the 30th day of September 1925 The City of Decatur refused to accept said surrender and notified the street railway companies of its refusal.

(c) The City of Decatur brought its equitable action to prevent the termination, ending and surrender of the franchises and contracts and to compel continued and perpetual operation at a five cents rate of fare, basing its said action upon the contract of April 1, 1903; alleging that the action of the street railway company in ending, terminating and surrendering the franchises and contracts was a breach of the contract of April 1, 1903, and prayed that by vitue of said **contract** the defendents be **perpetually** compelled to operate said North Decatur line as at present operated, and at a five cents per passenger rate of fare, and that by injunction the street railway companies be forever and perpetually compelled to operate under said contract; and perpetually restrained from claiming that it had expired; and be perpetually restrained from terminating or surrendering it; and that said contract

be held to be a perpetual never ending binding contract, which defendants could never terminate or surrender.

2.

The Street Railway Companies, Georgia Railway & Electric Company and Georgia Railway & Power Company (subsequently consolidated into the Georgia Power Company) showed by answer and cross bill substantially as follows:

(a) The street railway lines in question within the Municipality of Decatur were constructed and being operated under the franchise of September 4th, 1899 granted to the Collins Park & Belt Railroad Company, which franchise was by deed of March 28th, 1902 acquired by the Georgia Railway & Electric Company; that on the 1st day of April 1903 the Georgia Railway & Electric Company and the Town of Decatur entered into the contract referred to, but that neither the franchise nor the said contract placed a never ending obligation on the street railway companies to perpetually operate thereunder; that by proper corporate action the street railway companies had ended, terminated and surrendered the said franchise and contract in question and had surrendered all its rights to operate thereunder; and that the Municipal action in refusing to accept said termination and surrender was illegal and unconstitutional; and if said action was upheld would result in a continual never ending confiscation of the property of the street railway companies, in contravention of the 14th Amendment of the Constitution of the United States.

(b) The franchise and contract did not require eternal and perpetual operation thereunder; and that the property of the street railway companies would be confiscated in violation of the 14th Amendment of the Constitution of the United States, if the action brought by the Municipality was upheld and the street railway companies were perpetually restrained from and denied the right to end, terminate or surrender the franchise or permit and cease operation thereunder; that the rate of fare which the street railway companies could charge (if the street railway companies were

perpetually compelled to operate thereunder) did not even pay the operating expenses and would forever be confiscatory and discriminatory; that such fact had been expressly held by the Georgia Public Service Commission; but said Commission, under the Georgia law, had not been given the power to relieve the same or to pass upon the right to discontinue service. While seeking to compel continued and perpetual operation under said contract, the said City of Decatur was proceeding to pave the streets occupied by the line in question and by virtue of and because of such continued operation would proceed to collect special paving assessment against the street railway company to the amount of $14,000 which would further confiscate the property of the street railway company in violation of the 14th Amendment of the Constitution of the United States if the street railway companies were denied the right to cease operation; and that the street railway companies did not and could not receive any benefit from the street paving; the street railway companies had both the legal and constitutional right to cease operation and to end, terminate or surrender the franchise and contract; that neither the franchise nor the contract compelled perpetual, never ending service, that they had been ended, terminated or surrendered; and to compel continued perpetual, never ending operation thereunder would deprive the street railway companies of their property without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

(c) In former litigation the street railway companies, while continuing to operate under the said franchise or contract in question, had undertaken to compel the Georgia Public Service Commission to fix a reasonable fare to be charged, but the Supreme Court of Georgia held that the line in question was a separate and distinct classification from the other lines placed under said Commission's jurisdiction and that it had been given no jurisdiction over the fare to be charged thereon.

(b) Subsequently the street railway companies, while operating under the said municipal franchise or contract, undertook to raise the contract rate of fare. The Town of

Decatur brought suit against the street railway company to prevent it from changing the rate provided for in the contract In that litigation the controlling question was the power or authority of the Municipality to make a rate contract, and the courts held that the Municipality possessed such authority.

(e) After the said decision the City of Decatur procured a legislative amendment to its municipal charter, giving it the power and authority to lay or construct street paving upon and along the streets of the Municipality occupied by the street railway companies under the said franchise in question; and assess part of the costs of such street paving against the street railway companies; which it could collect by levy on and sale of any property of the street railway companies, whether benefited by or located on or adjacent to the streets paved. In conformity with such charter amendment, the City of Decatur, in 1925, passed certain paving ordinances under which said municipality could proceed to pave its streets along which the line in question had been constructed and was being operated, and then collect the costs of such paving by levy upon any street railway property; that after the passage of such ordinances (but prior to the beginning of the municipal paving) the street railway companies notified the City of Decatur that they were operating said lines in said Municipality at a loss; that the five cent rate of fare did not even pay bare operating expenses; that further continued operation would be made the occasion to subject the street railway companies to a confiscatory street paving assessment; that under the facts in this case neither the street railway companies nor the property of the street railway companies in Decatur could receive any benefit from street paving; that continuing to operate would confiscate the property of the Railroad Companies and that to continue operation and be subject to paving assessment would additionally confiscate their property. Therefore, a request was made that the street railway companies be relieved from such additional confiscatory burdens; otherwise the companies would be compelled to cease further operation within the Municipality. The City of Decatur refused such

request and passed ordinances to pave its streets occupied by the said street railway lines and to assess part of the costs thereof against the street railway companies and collect the same out of the street railway property, other than that along or adjacent to the streets paved. The street railway company then took proper corporate action ending, terminating and surrendering the said franchise or contract and served written notice thereon on the City of Decatur, notifying the Municipality that the street railway companies would cease operation thereunder at a certain time; the street railway companies also offered to surrender to the said Municipality its entire street railway property within the said Municipality constructed or operated under the franchise or contract; the Municipality refused all the said offers or tenders. The street railway companies set up that the equitable suit brought by the Municipality to compel perpetual and continual street railway operatoin was based upon a municipal franchise or contract which did not require continued or perpetual operation and which had expired or been terminated or surrendered; that to refuse the street railway companies the right to cease operation within the said Municipality of Decatur and compel perpetual continued and never ending operation at the five cents rate of fare as provided in said expired, ended or surrendered contract, would be a denial to the companies of their constitutional rights as guaranteed to it by the 14th Amendment of the Constitution of the United States and would result in continual and perpetual confiscation of the property of the street railway companies in contravention of said Constitutional provision.

The street railway company also prayed in its answer and cross bill, that under the facts as herein set out, the Court declare said contract or franchise ended, terminated or surrendered and that it be relieved from further operation thereunder.

8.

The case came on for final hearing before the Superior Court of DeKalb County.

(a) The evidence in the case was undisputed and showed that the five cents rate of fare was both confiscatory and discriminatory; and that compelled continued operation thereunder would confiscate the property of the street railway companies; the street railway companies had taken corporate action terminating, ending and surrendering all the rights to further operation in the Municipality of Decatur. The allegations of fact as set out in the answer and cross bill of the street railway company were proved either by an agreed statement of fact or by undisputed evidence.

Under the undisputed evidence; the question for decision became a question of law, to wit; whether the franchise of September 4th, 1899 and/or the Municipal rate contract of April 1st, 1903, compelled perpetual never ending street railway operation within the Municipality of Decatur; and were such perpetual contracts as could never be ended, terminated or surrendered by the street railway company.

The trial court entered a final decree and adjudged and decreed that the street railway companies be and are hereby enjoined as prayed for in the petition (thus giving effect to every one of the prayers of the petition.)

The effect of this decree was to hold that, under the municipal rate contract in question, the street railway companies were perpetually compelled to operate its street railway lines within the Municipality of Decatur; that said contract was a perpetual never ending contract; that it had not been performed, expired or been terminated or legally surrendered; and that it could not be ended, terminated or surrendered by the street railway companies.

5.

The final decree of the trial court was carried, by writ of error, to the Supreme Court of Georgia, the highest Court of the State in which a decision could be had.

On the 28th day of June 1929 the said Supreme Court of

Georgia finally affirmed and sustained the judgment and decree of the trial court.

6.

Petitioner submits the following reasons why the writ of certiorari should be allowed:

Throughout the proceeding in this case petitioner has specifically set up and contended and now contends that it is being deprived of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, in that the final judgment or decree, affirmed by the Supreme Court of the State of Georgia, perpetually requires petitioner to operate its street railway lines in the City of Decatur and perpetually requires petitioner to render service at a confiscatory and discriminatory rate of fare; and that such compelled perpetual and never ending operation is required under a municipal ordinance, franchise or contract which petitioner specifically claims has been fully performed, has expired or been terminated or ended or surrendered; that where such questions are raised, this Court should determine for itself the extent, terms and duration of the said municipal ordinance, franchise and contract.

(a) That the municipal franchise of September 4, 1899, under which the street railway lines in the City of Decatur were constructed and being operated had expired, been terminated, ended or surrendered by timely written notice; and that such franchise does not require perpetual, never ending operation.

(b) The municipal contract of April 1, 1903 referred and applied to the line as operated under the franchise of September 4, 1899; that said contract taken in connection with said franchise, or said municipal contract taken alone, did and does, not require perpetual never ending street railway operation and that said contract had been fully performed, ended, terminated or surrenderer by timely written notice:

(c) That applying to the municipal franchise of September

4, 1899 and the municipal contract of April 1, 1903 the principle of law as held in numerous decisions of this Court, neither the said franchise nor the said contract taken together or taken alone required perpetual, eternal and never ending street railway operation.

(d) That this Court in a number of cases stated the principle, that a municipality possessing the **power and authority** to make rate contracts can only make them for a definite time **"not grossly unreasonable in point of time,"** and that petitioner is entitled to have this Court determine, whether the municipal rate contract in question compels perpetual street railway operation at the confiscatory and discriminatory rate of fare therein provided, when petitioner has specifically raised the question that such compelled continued and perpetual operation thereunder is and would perpetually deprive it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, and that the contract, under which such perpetual operation is required has been performed, has expired, been ended or surrendered.

(e) To compel continued and perpetual street railway operation in the City of Decatur and to deny the street railway companies the right to cease all operation therein would compel petitioner to perpetually operate its property in said Municipality at a never ending loss and because of such compelled operation petitioner and its property would be subjected to further confiscation by virtue of confiscatory paving assessments; and a denial of the Company's right to entirely cease operation and surrender its franchise and contract within said Municipality would unconstitutionally deprive it of its property in contravention of the 14th Amendment of the Constitution of the United States as such compelled perpetual operation is not required under any contract.

(f) Petitioner respectfully submits that the questions specifically raised in the instant case involve federal questions; and are not only of great importance to petitioner, involving the never ending confiscation of its property in violation of

the 14th Amendment of the Constitution of the United States; but questions of general importance; and that the decision of the Supreme Court of Georgia sought to be reviewed, is in conflict with the principle of law as laid down in a number of cases heretofore decided by this Court.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Georgia, to the end that the judgment and decree of the Supreme Court of Georgia may be reviewed and reversed by this Honorable Court.

WALTER T. COLQUITT
BEN J. CONYERS
Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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GEORGIA POWER COMPANY,
Petitioner

vs.

CITY OF DECATUR,
Respondent.

No. .....

OCTOBER TERM 1929

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A full statement of the case appears in the petition for writ of certiorari.

The undisputed facts established the proposition that to compel perpetual and continued operation at the five cents rate of fare, as required by the decision of the Supreme Court of Georgia, the highest Court of the State in which a decision could be had, would require petitioner to perpetually render a Public Utility service at a confiscatory and discriminatory rate of fare.

Petitioner has specifically set out and claimed that it is being deprived of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, in that the judgment and decree of the Supreme Court of Georgia requires petitioner to operate its street railways in the Municipality of Decatur at a confiscatory and discriminatory rate of fare; and that such compelled, perpetual and continued operation is required under a municipal franchise or contract, which petitioner claims has been fully performed or has expired or been terminated or surrendered; and that the Municipality by virtue of such compelled con-

tinued operation is further confiscating petitioner's property in violation of the 14th Amendment of the Constitution of the United Staes by levying paving assessments against the street railway company for which no benefit will or can be received by the street railway companies.

OPINION OF THE COURT BELOW

The dicision of the Supreme Court of the State of Georgia is set out in full in the record (pages 146-153 original record. Pages ..... printed record.) Said decision was handed down on April 15th, 1929; but, within the time allowed under the rules of practice in the Supreme Court of the State of Georgia a petition for a rehearing and motion in the nature of a rehearing was granted. (See page 158 original record. Pages ..... printed record.)

Thereafter a part of the decision as originally prepared by the Supreme Court was changed and on the 28th day of June 1929 a final judgment was rendered by the Supreme Court of the State of Georgia affirming the judgment theretofore rendered. (See pages 158 and 159 original record. Pages ..... printed record.)

The dicision of the Supreme Court of the State of Georgia affirming the decree and judgment of the lower court was based upon the municipal rate contract of April 1, 1903. (See page 150 original record. Pages ..... printed record.)

JURISDICTION

The jurisdiction of this Court is sought by virtue of the present judicial Code Section 344 (b) (Former Judicial Code Section 237 as amended by the Act of February 13th, 1925) which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest

court of a State in which a decision could be had ... where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution ... of the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

This Court has repeatedly held that where questions similar to the one just heretofore stated are specifically raised and the question sought to be brought to this Court for review involves the duration and the present existence of a municipal ordinance or contract, or whether such contract has been performed, expired, terminated or surrendered and petitioner will be deprived of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States, if the decree of the Court as rendered required continued operation under such claimed municipal franchise or contract, it will determine for itself the extent, terms and duration of such Municipal franchise and contract.

In the Railroad Commission of Texas vs. Eastern Texas Railroad Company, 264 U. S. 79, 76, this Court held:

> "Where it becomes necessary to consider whether a state is depriving, or attempting to deprive, a litigant of property without due process of law, in violation of the 14th Amendment, and the question turns on the existence and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms, Louisville & N. R. Co. vs. Palmes, 109 U. S. 244, 255, 27 L. ed. 922, 929, 3 Sup. Ct. Rep. 193; Stearns vs. Minnesota, 179 U. S. 223, 232, 45 L. ed. 162, 169, 21 Sup. Ct. Rep. 73.
>
> The principle is general and necessary. Ward v. (87) Love County, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 Sup. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the State tribunal, as to what are the facts alleged to give rise to the right, or to bar the assertion of it even upon local grounds. Davis vs. Wechsler, 263 U. S. 22, 24, ante, 134, 145, 44 Sup. Ct. Rep. 13."

To the same effect see

Columbus Railway, Power & L. Co. vs. Columbus 249 U. S. 399, 406, 407.

See also the following cases decided by this Court in which exactly similar questions to the one involved in the case at bar were brought to this Court for review; and the decision rendered in each case is controlling in favor of petitioner's contention hereafter discussed.

Cleveland U. R. Co. vs. Detroit, 204 U. S. 116;

Detroit U. R. Co. vs. Detroit, 229 U. S. 39;

Blair vs. Chicago, 201 U. S. 400.

In said cases it was the street railway company which contended that certain municipal rate contracts (entered into between the street railway company and the Municipality) had the effect of extending former municipal franchises; and that under such municipal rate contract the street railway company had been given the right and authority to continue operation upon the streets in the Municipality. We respectfully submit, that the municipal rate contracts under consideration in each of said cases were more susceptible of such construction, than the municipal rate contract in the case at bar (hereinafter discussed). This Court, however, held that under the principle of law as repeatedly announced by it, it was impossible to hold that the municipal rate contract extended the franchise; and therefore the street railway company only had the right to operate within the Municipality for and during the definite franchise period. For instance see the case of Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43-45, (where former cases of this Court are quoted and discussed). It is, of course, immaterial, that in the case at bar, it is the street railway company which contends that the municipal rate contract in question does not extend the duration of its franchise; and that, therefore, under such municipal rate contract it cannot be required to render perpetual never ending operation and service.

Such municipal rate contracts are to be similarly construed, whether the street railway company is contending that it has the right to further operate thereunder, or is denying the Municipality's right to compel perpetual never ending operation thereunder.

Applying the principle of law (as announced in the cases of this Court just heretofore cited) to the Municipal Rate Contract involved in the case at bar, then as held by this Court in the case of Denver vs. Denver Union Water Company, 246 U. S. 178, 184; "It is a necessary corollary that the Company may discontinue its service at will."

SPECIFICATIONS OF ERROR

The specifications of error are set out in the petition for certiorari under the 6th Paragraph, heading "Reasons Why the Writ of Certiorari Should Be Allowed," and are as follows, to wit:

(1) The Supreme Court of the State of Georgia erred in finding and holding that the municipal rate contract of April 1, 1903 requires perpetual, never ending street railway service within the Municipality of Decatur and that said contract was a perpetual never ending one.

(2) The Supreme Court of the State of Georgia erred in not holding that the contract of April 1, 1903 had been performed, expired or terminated or legally surrendered and erred in holding that said contract could not be terminated, ended or surrendered by the street railway companies ceasing to operate within the Municipality.

(3) The Supreme Court of the State of Georgia erred in not holding that the municipal rate contract of April 1, 1903 should be construed in connection with the franchise of September 4, 1899 and that said franchise and contract had been performed, expired, terminated or legally surrendered.

(4) The Supreme Court of the State of Georgia erred in not holding and finding that said contract of April 1, 1903

referred and applied to street railway lines as operated under the franchise of September 4, 1899, and that said contract taken in connection with said franchise, or said municipal contract taken alone, did not require perpetual never ending street railway operation within the Municipality of Decatur.

ARGUMENT

The legal argument with reference to said specifications of error involve the construction of the franchise of September 4, 1899 and the construction of the municipal rate contract of April 1, 1903. We respectfully submit that the decision of the Supreme Court of Georgia is in conflict with the decisions of this Court just heretofore cited, and with the principles of law as laid down therein and the other decisions hereafter cited.

THE DECATUR MUNICIPAL FRANCHISE OR CONTRACT HAVE BEEN FULLY PERFORMED, ENDED, EXPIRED OR BEEN SURRENDERED

In former litigation the power and authority of the parties to enter into a rate contract has been upheld. The record in such former litigation was not introduced in evidence and formed no part of the record in this case; as, what was there adjudicated does not affect the questions herein raised.

In the present litigation the power and authority of the parties to enter into a rate contract is not raised and neither is the street railway company, while continuing to operate under the franchise or contract, undertaking to charge a rate of fare different from that therein provided.

The present litigation involves the questions of the right to surrender the franchise or contract; whether or not it has expired, been terminated or ended, and whether the street railway company can perpetually be compelled to operate thereunder at a confiscatory rate of fare.

A similar situation existed in the case of Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130. There it appeared

that the Supreme Court of the United States had twice theretofore rendered opinions upholding the validity of the municipal rate contract and when the case was again brought before this Court it said: "Therefore, in deciding this case, we assume the validity of the contract whatever it is that was made. The only question involved herein is one of construction and intent." This Court then decided for itself the duration of the various municipal franchise and rate contracts therein involved.

The question now sought to be brought to this Court for decision is not one in which petitioner is seeking to continue to operate under a municipal franchise or contract and at the same time contest the validity or extent of its rate of fare provision. By proper corporate action petitioner has surrendered all its rights to operate thereunder; and also contends that the municipal franchise and contract in question have been terminated, ended, been performed or surrendered and that to compel continued and perpetual operation thereunder; at the discriminatory and confiscatory rate of fare, would deprive it of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

The action brought by the City of Decatur to compel perpetual continued street railway operation of the line in question is based entirely upon the contract of April 1, 1903 (See paragraph 31 of the petition, page 90 of the original record. Page ..... printed record.) In considering whether such contract requires perpetual and never ending operation it will first be considered in connection with the municipal franchise under which the line in question was constructed and operated.

THE FRANCHISE UNDER WHICH THE LINE IN QUESTION WAS CONSTRUCTED AND BEING OPERATED HAS EXPIRED AND BEEN TERMINATED BY TIMELY WRITTEN NOTICE

The line in question was built, constructed and being

operated under a franchise from the City of Decatur to the "Collins Park & Belt Railroad Company," granted September 4, 1899. (Agreed statement of facts Original Record pages 6-8, printed record pages ..... where the entire franchise is set out.)

In 1900 the name of the "Collins Park & Belt Railroad Company" was changed to "Atlanta Rapid Transit Company."

In 1902 the franchise in question was conveyed by deed from "Atlanta Rapid Transit Company" to "Georgia Railway & Electric Company."

(Agreed statement of facts Original Record pages 6, 14, printed record pages ..... .)

The change of the name of Collins Park & Belt Railroad Company to Atlanta Rapid Transit Company and the deed from Atlanta Rapid Transit Company to Georgia Railway & Electric Company are only material as showing the chain of title of the franchise in question into the Georgia Railway & Electric Company.

On April 1, 1903 the Georgia Railway & Electric Company entered into a contract with the Town of Decatur, fixing a five cents contract rate of fare to be charged on the said line, designated therein as the Rapid Transit Line.

The franchise in question expired August 16, 1919 *and thereafter continued operation thereunder since said date has been similar to a tenancy at will or at sufferance.*

The Collins Park & Belt Railroad Company was incorporated under the Acts of the General Assembly approved August 16, 1889.

(Agreed statement of facts Original Record pages 1-6, printed record pages ..... where the entire act is set out.)

The duration of its charter was not therein specially set out, therefore, under the law of Georgia, its charter expired 30 years from the date of its grant or 30 years from August 16, 1889, or August 16, 1919.

Georgia Code 2215 provides:

> "Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of 30 years from date of its grant."

See also

West End & Atlanta St. Rd. Co. vs. Atlanta St. Rd. Co. 49 Ga. 151 (1).

The Central R. & B. Company vs. State of Georgia, 54 Ga. 404, 420; 422.

The franchise in question was granted to the "Collins Park & Belt Railroad Company."

(Original Record pages 6-8. Printed Record pages .....)

Under all the authorities the duration of such franchise is for and during the charter life of the Company, therefore, the municipal franchise of the said Rapid Transit line in Decatur expired August 16, 1919.

Turnpike Co. vs. Illinois, 96 U. S. 63.

Blair vs. Chicago, 201 U. S. 400;

Omaha Electric Light & P. Co. vs. Omaha, 179 Fed. 455 (3), 460.

Wyandotte Elec. Lt. Co. vs. City of Wyandotte, 124 Mich. 43; 82 N. W. 821.

Rokworth vs. St. Road Bridge Co. 108 N. W. 785.

The conveying of this franchise to successive street railway companies does not change its duration and is immaterial except as showing title thereto.

Virginia Cannon Toll Road Co. vs. People, 22 Col. 429; 37 L. R. A. 711, 718, 719.

Blair vs. Chicago, 201 U. S. 400, see pages 481, 482.

The said Decatur franchise by its terms expired on August

16, 1919. Subsequent to that date the continued operation of said line thereunder constituted a relationship between the municipality and the operating street railway company similar to that of tenancy at will.

Omaha Electric Light & Power Company vs. City of Omaha, 179 Fed. 455 (3), 460

Detroit United Ry. Co. vs. City of Detroit, 229 U. S. 39, 42.

City and County of Denver vs. New York Trust Company, 229 U. S. 123; 142.

Or a tenancy at sufferance.

Sutton vs. Hiram Lodge, 88 Ga. 770.

Standley vs. Stembridge, 140 Ga. 750 (5), 754, 757.

Crawford vs. Crawford, 139 Ga. 394 (4), 396, 399.

Either of such tenancies can be terminated by either party by reasonable notice.

Denver vs. Denver Union Water Co. 246 U. S. 178; 184

Western U. Tel. Co. vs. Fain & Parrott, 52 Ga. 19, 22.

On the question of notice see also

Risley vs. City of Utica, 179 Fed. 885, and cases there cited.

In a tenancy at will or a tenancy at sufferance a party while continuing to occupy the premises cannot escape the burdens incident thereto; but either party can terminate such burdens and put an end to such further continued relationship by notice.

All the authorities hold that operation under an expired municipal franchise creates an exactly similar relationship.

See cases heretofore cited.

Plaintiff in error took proper corporate action terminating and surrendering the franchise in question.

(Original Record pages 51-57. Printed Record pages.....)

Proper and reasonable notice of such action was given to

the municipality, the only party upon whom such notice could be served.

(Original Record pages 51-57. Printed Record pages.....)

The franchise having expired by its terms and the holding over having been terminated by due and reasonable notice, it is inconceivable how respondent can sustain the decree perpetually enforcing continued street railway operation thereunder.

It certainly would not be held that a landlord could successfully maintain a suit in equity and by injunction perpetually compel a tenant at will or sufferance to continue to occupy his premises because the landlord desired to enjoy for all time to come the benefits he was receiving by such continued occupancy; yet, that is exactly what is done by the decision in question.

We have found no case in conflict with the legal principles just heretofore discussed.

We respectfully submit, that the Supreme Court of Georgia in effect, admits the legal contention just heretofore stated, to wit; that the franchise in question has expired, terminated and ended; for, that Court in its opinion said "It is not so much the franchise we are dealing with, but the specific contract made in pursuance thereof;" and then based its opinion upon the contract of April 1, 1903.

We submit that under a number of decisions of this Court the duration of the franchise and the right to surrender it, is decisive of the duration and the right to surrender a contract made with reference thereto.

Cleveland E. R. vs. Cleveland, 204 U. S. 116, 130.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

The contract of April 1, 1903 in referring to the Rapid Transit line did not undertake to change the duration of the franchise under which said line was being operated or the

rights of the parties to terminate it or cease operation thereunder.

This Court has repeatly held that the duration of municipal franchises and contracts cannot be extended by implication.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39; 43; 44.

Blair vs. Chicago, 201 U. S. 401, 471, 474.

MUNICIPAL CONTRACT OF APRIL 1, 1903

Said municipal contract is set out in full on pages 14-22 of the original record. Pages ..... printed record.)

The municipal contract of April 1, 1903 did not expressly or by implication extend the duration of the franchise, under which the line in question was constructed and being operated within the City of Decatur; and did not and could not affect franchises from other municipalities.

This contract first deals with discontinuance and removal from the streets of Decatur of a line of track known as the Atlanta Railway Company and required the street railway company upon such removal to restore the surface of the streets in good condition. There is no contention that the franchise of the Atlanta Railway Company in Decatur had not expired long prior to the present litigation. The discontinuance of the Atlanta Railway Company's line 26 years ago (in 1903) does not affect the duration of the franchise of the Atlanta Rapid Transit line.

The other parts of the said contract by actual terms and description relate and refer to "Atlanta Rapid Transit Line." There is not a word or line which, either expressly or by implication, deals with or undertakes to extend the duration of the franchise of said Rapid Transit line. The length of time said line must operate in Decatur is not extended. When the contract of April 1, 1903 was made it did not and was not intended to cover or deal with such questions. The City of Decatur's Municipal franchise under which the Atlanta Rapid Transit line was being operated had not expired; by

its own terms it was to continue for a further duration of 16 years. The said contract of April 1, 1903 was not intended to and did not (either expressly or by implication) undertake to modify, enlarge or change or deal with that question.

In the cases in which this Court has had municipal contracts, (with much broader provisions than those contained in the contract of April 1, 1903) before it for consideration; it has in every case held that such contracts did not extend or enlarge the duration of the former municipal franchise.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 166.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

We respectfully submit that the contract of April 1, 1903 in no way changed the duration of the municipal franchise of Atlanta Rapid Transit Company line (heretofore discussed) or the rights of the parties with reference to its termination or surrender.

The Supreme Court of Georgia largely relied upon the expression of the contract "to never charge more than five cents for one fare."

The provision of the contract is "to never charge more than five cents for one fare, upon its Decatur line above referred to as the Rapid Transit Line." (The said line in Decatur is then described in detail.)

It will be seen that said provision or contract as to the rate of fare was made with reference to the line already constructed and in operation. It fixed the rate of fare while the line was operating. Such provision did not undertake to compel perpetual and never ending operation.

This exact question was before this Court in the case of Cleveland E. R. Co vs. Cleveland, 204 U. S. 116 in which it was held that the municipal rate contract did not change the duration of the franchise.

See also

Detroit U. R. Co. vs. Detroit, 229 U. S. 39; 43; 44; 45.

In Charleston Isle of Palms Traction Co. vs. Shealey, 266 Fed. Rep. 406 the Court held that a five cents rate of fare was fixed by contract; and that the street railway company was bound thereby while it operated thereunder; but, also further held; that the street railway company had the constitutional right to cease operation thereunder and thus avoid the confiscatory rate.

As to such right to discontinue operation.

See also

Railroad Commission of Texas vs. Eastern T. R. Co. 264 U. S. 79, 85, 86.

In the case of Brooks-Scanlon Co. vs. Railroad Commission of La. 251 U. S. 396 this Court held: "A carrier cannot be compelled to carry on even a branch of business at a loss."

In the case of State of Iowa vs. Old Colony Trust Company, 215 Fed. 307, 313 (cited approvingly by this Court in many cases) the Court held that "A railroad company may abandon an unprofitable and irreclaimable part of its road and neither the State nor unfortunate investors along the line can justly complain."

In the case of Munn vs. Illinois, 94 U. S. 113, 192, this Court said:

> "The grantor may withdraw his grant by discontinuing the use; but so long as he maintains its use, he must submit to the control."

To the same effect see

Erie Board of Public Utility Commissioners, 254 U. S. 394, 411.

It has been repeatedly held that a street railway company can surrender such a franchise as the one in question to the

municipality which granted it and discontinue operation over the tracks within the municipality covered by it.

Stiles vs. Citizens Electric Street Railway Co. 19 L. R. A. (N. S.) 865; 199 Mass. 294, 85 N. E. 419.

State of Montana & Knight vs. Power Company, 44 L. R. A. 692, 22 Montana 391, 65 Pacific 685.

San Antonio Street Railway Company vs. State of Texas, 35 L. R. A. 662, 30 S. W. 926.

Charleston Isle of Palms Traction Co. vs. Shealey, 268 Fed. 406.

Southern Bell Tel. & Tel. Co. vs. Railroad Commission of South Carolina, 280 Fed. Rep. 901, 902 (7).

Gilschrist vs. Waycross Street & Suburban Railroad Co. 246 Fed. Rep. 952.

The Supreme Court of the State of Georgia said: "When this contract was before the Supreme Court of the United States (262 U. S. 438 supra) the court said with reference to the duration of this contract, "that this contract would remain effective until there should be conflicting legislative action."

That case arose over an endeavor on the part of the street railway company, while operating under the franchise, to change the contract rate of fare as added to the franchise by the contract of April 1, 1903. The street railway companies served notice on the Municipality of Decatur that on and after October 20, 1920 it (the street railway company) would charge a seven cents rate of fare on the said North Decatur or Rapid Transit Line. The Municipality of Decatur then brought an equitable suit to enjoin the street railway company, while operating under the franchise in Decatur, from changing the rate of fare, as provided in the contract. In answer to such suit the street railway company contended lack of power and authority in the Town of Decatur to make a rate contract; that the rate of fare provision was not a contract.

The decision of this Court shows that it was dealing with

such questions and not with the right of the municipality to compel perpetual never ending operation thereunder.

The question there decided is entirely different from the one involved in the present litigation. As controlling on this question see

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130.

The Supreme Court says that the contract of April 1, 1903 if not expressly, **impliedly** gives consent to the operation of the line in question within the municipality.

The provision of the contract to which the Supreme Court of Georgia was referring is as follows:

> "To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit line from terminus to terminus, the loop already described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain permission to construct said double track, which said double track, when completed shall be maintained in a substantial safe and expenditious manner and shall be operated with cars and rolling stock kept in safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted."

That such and similar provisions do not extend the duration of the franchise (the franchise of September 4, 1889 heretofore discussed) was held by this Court in Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116.

See also

Detroit U. R. Co. vs. Detroit, 229 U. S. 39; 44, 45.

Blair vs. Chicago, 201 U. S. 400.

The said provision of the contract was not an undertaking on the part of the parties to change or affect the duration of the franchise under which the line was being operated.

The agreed statement of facts show that no double track

was laid within the Municipality of Decatur under it; however, this is immaterial for as held in the Cleveland case (204 U. S. 116, 137-140) a right given to construct an additional track would not affect the duration of the franchise under which the single line had been constructed. In fact the contract in question, provides that the loop in Decatur (as already constructed) was to be considered a double track. Nothing said in said contract was intended to affect the duration of franchises received from other municipalities. While operating, a legal duty rests upon the company to maintain its tracks in a safe and expeditious manner and to keep its cars and rolling stock in good and comfortable condition. This, however, does not compel perpetual never ending operation at a loss.

City of Texas vs. Eastern Texas Rd. Co. 264 U. S. 79, 85.

Also see

Texas & R. P. Co. vs. Marshall, 136 U. S. 393.

Jones vs. Newport News, 65 Fed. 736, 741 (2).

Texas & P. R. Co. vs. Scott, 77 Fed. 726 (2), 730.

In the case of Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, 133 the grants then being considered by this Court specifically referred to lines which were to be operated in connection with other and different lines. Nevertheless this Court held that such reference did not have the effect of extending the duration of any line, though the lines referred to had franchises of longer duration.

THE PRINCIPLE OF LAW REPEATEDLY ANNOUNCED BY THIS COURT IN CONSTRUING MUNICIPAL CONTRACTS

This Court has repeatedly held that municipal rate contracts do not compel perpetual and never ending operation.

In the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393 this Court held; that a municipal contract providing that in consideration of certain donations made by the City, a rail-

road agreed that it would permanently establish its terminus in the City was performed by maintaining it there for eight years.

Certainly, under the undisputed facts in the case at bar, the street railway company cannot be compelled to perpetually operate under the municipal rate contract in question.

In the case of Home Telegraph & Tel. Co. vs. City of Los Angeles, 211 U. S. 265, this Court expressly held that municipalities possessing the power and authority to make rate contracts can only make them for a definite time "not grossly unreasonable in point of time." In subsequent decisions this Court has restated and followed that legal principle. (For illustration see cases cited in note (a)).

The contract of April 1, 1903 was made with reference to the Rapid Transit line constructed and being operated under the franchise of September 4, 1899. The duration of said fran-

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Note (a) In Southern Iowa Electric Co. vs. City of Charleston, 255 U. S. 359, the contract fixed a definite period of time, to wit: 25 years. In the decision the Court said no one would contend that a municipality could make "a valid contract fixing permanent rates."

In Freeport vs. Freeport Water Company, 180 U. S. 578, 600 the contract was for a definite period—30 years.

In Detroit vs. Detroit City R. Co. 134 U. S. 368, the contract was fixed for a certain definite period—30 years.

In Knoxville Water Co. vs. Knoxville, 189 U. S. 434, the Knoxville Water Company contended that there was a municipal rate contract for a definite period of 30 years. However, the Court held that there was not a contract fixing a rate for a definite term and permitted a change in rates.

In Cleveland vs. Cleveland City R. Co. 194 U. S. 519, see pages 535, 536, the contract was entered into in February 1885, and continued until February 1908, 23 years. In the opinion the Court says the provision as to rates of fare were fixed . . . for a stated time.

In Columbus R. Co. vs. Columbus, 249 U. S. 399, the rate contract was for a definite time—25 years.

chise was not extended by the said contract of April 1, 1903. If only the said contract itself is considered, then there is no provision in it that it is to be a perpetual never ending contract.

If it is claimed that no limit as to duration is specified therein; then the rule of law practically universally followed is that such contracts can be terminated after reasonable length of time and upon reasonable notice.

In Jones vs. Newport News & M. Co. 65 Fed. 736, Judge (now Chief Justice) Taft held:

> "The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch on the main line for any definite length of time, or that either expressly agreed to keep it there forever; the plaintiff contends, that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times—forever. Such a construction is quite at variance with the views of the Supreme Court, as expressed in Texas & P. R. Co. vs. City of Marshall, 136 U. S. 393, 10 Sup. Court 846."

Many of the decisions hold that perpetual contracts of this character will not be tolerated, that a court of equity will not compel perpetual performance.

Texas & P. R. Co. vs. Marshall, 136 U. S. 393.

McCullough-Dalzell Crucible Co. vs. Philadelphia Company, 72 Atl. Rep. 633. (Note (b)).

Note (b) In 3 Elliott on Contracts, Sec. 1871, the rule is laid down as follows:

> "Even though there is no express provisions for terminating a contract which is definite in duration and continuous in its nature there is usually an implied option in either party to terminate such a contract as to the part remaining executory."

Barney vs. Indiana Ry. Co. et al 61 N. E. 194.

The decree affirmed by the Supreme Court of the State of Georgia requires perpetual and never ending operation of the line in question under the Decatur municipal rate contract in question. Unless the contract in question requires such perpetual, and never ending operation then under the undisputed facts, the street railway company's property will perpetually be confiscated in contravention of the 14th Amendment of the Constitution of the United States.

This Court has repeatedly held that railroad legislative charters (which are contracts) containing much more imperative terms than the municipal contract in question did not deprive the railroad companies of the constitutional right to cease operation thereunder when future operation was unprofitable.

City of Texas vs. Eastern Texas Rd. Co., 264 U. S. 79 and cases therein cited:

Brooks-Scanlon Co. vs. Railroad Commission 251 U. S. 396; Munn vs. Illinois, 94 U. S. 113.

We respectfully ask the grant of the writ of certiorari in order that this Court may consider and determine for itself whether the City of Decatur municipal rate contract in question compels the street railroad company perpetually to devote its property in the said Municipality to the use of the public; and perpetually compels it to operate therein at a rate of fare not sufficient to pay bare operating expenses.

Turtle Creek Borough vs. Penn Water Co. 99 Atl. 199.

In the case a Borough granted a franchise to a water company providing the company rates for domestic purposes shall not exceed a certain rate. The contract contained no definite limitation as to the time. The court held that it was revocable upon reasonable notice under changed conditions.

Borough of Bellevue vs. Ohio Valley Water Co. 91 Atl. Rep. 236.

Joilet Bottling Co. vs. Joilet Citizens Brewing Co. 98 N. E. 263.

The City of Decatur by virtue of compelled operation of the line in question is also further seeking to impose paving assessments against the street railway company amounting to $14,000 from which the street railway company can receive no benefits. The pleadings show that the street railway company tendered to the Municipality its property located therein along and adjacent to the streets to be paved and its entire street railway property constructed and located within the Municipality of Decatur under the franchise and contract heretofore discussed. The Municipality admits that such property is not worth the amount of the assessment by refusing the tender of such property. We respectfully submit, under the principle of law laid down by this Court in the case of Erie Railroad Company vs. Public Utility Commission 254 U. S. 394, 411, such facts give the street railway company the constitutional right to surrender said franchise or contract in the Municipality and cease operation thereunder. In that case this Court said: "If the burdens imposed are so great that the railroad cannot be run at a profit, it can stop, whatever misfortune the stopping might produce." Certainly the municipal rate contract in question does not deny the street railway company its constitutional right to cease operation under such facts.

The Supreme Court of Georgia cites the case of Fort Smith Light & Traction Company vs. Fargan Bourland, 267 U. S. 300. We respectfully submit that that case is not applicable; the facts in that case were as follows:

The street railway lines within the Municipality of Fort Smith were constructed and operated under a franchise from the Municipality. In 1919 the franchise, together with its obligations and requirements, was, pursuant to a statute of the State of Arkansas, surrendered for an indeterminate permit, the express provisions of which bound the street railway company to operate all its lines within the Municipality unless permitted to abandon a part thereof with leave of the

City Commission, which exercised the powers of a public utility commission. Upon hearing the said commission refused to allow the railway company to abandon a part of a line. Notwithstanding this refusal and its continued operation under the indeterminate permit the street railway company sought to discontinue part of its line. The decision of this Court was that the street railway company by accepting the indeterminate permit had agreed to operate all of its street railway lines and could not, therefore, continue operation thereunder and escape the other burdens which it had agreed to. The concluding paragraph of the said decision is:

"The company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396. But the Constitution does not confer upon the company the right to **continue to enjoy** the franchise or indeterminate permit, and **escape from the burdens incident to its use.**" (Italics Ours)

In the case at bar the street railway company is not undertaking to operate within the Municipality of Decatur under the franchise or contract in question; but is seeking to surrender and cease operation thereunder "throughout the City."

Whether the Decatur municipal franchise has been performed, ended, terminated or surrendered or whether perpetual never ending operation thereunder can be compelled is not predicated upon the question whether other lines under other and different municipal franchises are still being operated,

Cleveland E. & R. Co. vs. Cleveland 204 U. S. 116.

The instant suit brought by the Municipality of Decatur seeks to compel perpetual operation under and by virtue of the contract of April 1, 1903. The said contract and franchise are seperate and distinct from the other franchises and street railway lines operated in other municipalities under franchises obtained from them. In fact the franchise in question has been

held to be a separate and distinct classification from all the other lines and franchises of the street railway company.

In Georgia, the Public Service Commission has been given no jurisdiction over this line and neither has it jurisdiction to determine the question of discontinuance of service.

Railroad Commission of Georgia vs. Macon Railway & Light Company, 151 Ga. 256.

The Georgia Public Service Commission has gone as far as it could; it has expressly held that the contract in question fixed a confiscatory rate; and, additionally held that said rate of fare was discriminatory, in so far as all the other lines of the company are concerned. (Original Record page 50. Printed record pages .....).

To require perpetual never ending operation under said conditions would, to use the language of this Court in (194 U. S. 517, 534) lead "to consequences dangerous to public interest, peace and tranquility, the extent of which it would be difficult in advance to see."

Said fact under the decision of this Court in the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393 is an additional reason why the street railway company should not be compelled to perpetually operate under said contract and should not be denied the right to surrender all its rights thereunder.

It is respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, in order that it may determine for itself the duration and terminability of the municipal franchise and the municipal rate contract in question and the right of the street railway company to end, terminate or surrender said contracts and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Georgia and finally reverse it.

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